

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eveready Insurance Company :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Tax :
under Article 33 of the Tax Law for the Year 1977. :
AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1985, he served the within notice of Decision by certified mail upon Eveready Insurance Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eveready Insurance Company
26 Court St.
Brooklyn, NY 11242

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of March, 1985.

David Parchuck

James A. DeLoach

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eveready Insurance Company :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Tax :
under Article 33 of the Tax Law for the Year 1977.:
AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1985, he served the within notice of Decision by certified mail upon Sidney T. Lippel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney T. Lippel
250 W. 57th St.
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of March, 1985.

David Parchuck

Connie R. Hargrave
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 14, 1985

Eveready Insurance Company
26 Court St.
Brooklyn, NY 11242

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 & 1519 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Sidney T. Lippel
250 W. 57th St.
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
EVEREADY INSURANCE COMPANY	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 33 of the Tax Law for the Year 1977.	:	

Petitioner, Eveready Insurance Company, 26 Court Street, Brooklyn, New York, 11242, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 33 of the Tax Law for the year 1977 (File No. 33294).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 24, 1984 at 9:15 A.M., with all documents to be filed on or before August 3, 1984. Petitioner appeared by Sidney T. Lippel, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether it was proper for petitioner to have claimed net operating loss carryforwards from 1974 and 1975 on its New York State return for the year 1977, notwithstanding the fact that it did not claim a Federal net operating loss carryforward from 1973 on its Federal return for the year 1977.

FINDINGS OF FACT

1. Petitioner, Eveready Insurance Company, filed a State of New York Franchise Tax Return for Insurance Corporations for the year 1977. On this return, petitioner reported a net operating loss carryforward of \$368,869.65 arising from losses incurred during 1974 and 1975.

2. Petitioner filed a U.S. Corporation Income Tax Return for the year 1977. On this return petitioner reported a net operating loss of \$374,604.03 arising from losses incurred during 1974 and 1975. The carryforward of petitioner's net operating losses from 1974 and 1975 reduced petitioner's federal taxable income during 1977 to zero.

3. On July 17, 1980 the Audit Division issued a Notice of Deficiency asserting a deficiency of Corporation Franchise Tax for the period ended December 31, 1977 in the amount of \$27,830.68 plus interest of \$5,597.77 for a total amount due of \$33,428.45. The Statement of Audit Adjustment explained, in substance, that petitioner had a Federal net operating loss carryforward from 1973 which could have been carried forward to 1977 which would also have reduced Federal net income to zero. However, since petitioner was not subject to tax under Article 33 of the Tax Law in 1973, a New York State net operating loss carryforward from 1973 to 1977 was not permitted. At the hearing, the Audit Division explained that no issue was presented with respect to a carryback of the 1973 loss.

4. During the years 1973 through 1975 petitioner had carryover losses, in consecutive order, of \$562,233.41, \$134,100.08 and \$304,371.55. In 1976 and 1977 petitioner had profits of, respectively, \$69,601.98 and \$335,873.28.

5. In 1973, petitioner paid \$67,745.66 to New York State pursuant to the Franchise Tax on Business Corporations under Article 9-A of the Tax Law.

CONCLUSION OF LAW

A. That section 1503(b)(4) of the Tax Law provides:

"(4) Any 'net operating loss deduction', 'operating loss deduction' or 'unused loss deduction' allowable under sections one hundred seventy-two, eight hundred twelve or eight hundred twenty-five of the

internal revenue code, respectively, which is allowable to the taxpayer for federal income tax purposes:

(A) shall be adjusted to reflect the modifications required by the other paragraphs of this subdivision;

(B) shall not, however, exceed any such deduction allowable to the taxpayer for the taxable year for federal income tax purposes; and

(C) shall not include any such loss incurred in a taxable year beginning prior to January first, nineteen hundred seventy-four or during any taxable year in which the taxpayer was not subject to the tax imposed under section fifteen hundred one."

B. That the amount of operating loss deduction carryback or carryforward is determined by the law in effect at the time of loss. (Treas. Reg. §1.172-1(e)).

C. That in 1973, Internal Revenue Code §172(b)(1)(A)(i) provided that for taxable years ending after December 31, 1957 "...a net operating loss shall be a net operating loss carryback to each of the 3 taxable years preceeding the taxable year of such loss." (emphasis supplied). In addition, section 172(b)(1)(B) provided that, with certain exceptions, a net operating loss for taxable years ended after December 31, 1955 "...shall be a net operating loss carryover to each of the five taxable years following the taxable year of such loss." (emphasis supplied).

D. That during 1973, section 172(b)(2) of the Internal Revenue Code provided, in part, as follows:

"(2) Amount of carrybacks and carryovers - Except as provided in subsections (i) and (j), the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the "loss year") shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried." (emphasis supplied).

E. That Treasury Regulation section 1.172-4(a)(3) provided in 1973 as follows:

"(3) Amount of loss to be carried. The amount which is carried back or carried over to any taxable year is the net operating loss to the

extent it was not absorbed in the computation of the taxable (or net) income for other taxable years, preceding such taxable year, to which it may be carried back or carried over. For the purpose of determining the taxable (or net) income for any such preceding taxable year, the various net operating loss carryovers and carrybacks to such taxable year are considered to be applied in reduction of the taxable (or net) income in the order of the taxable years from which such losses are carried over or carried back, beginning with the loss for the earliest taxable year." (emphasis supplied).

F. That in view of Internal Revenue Code sections 172(b)(1)(A)(i) and 172(b)(2), as well as Treasury Regulation section 1.172-4(a)(3), it is clear that petitioner did not have the option of ignoring the net operating loss in 1973. Rather, net operating losses were required to be utilized in the prescribed manner. Accordingly, the Audit Division properly concluded that petitioner was not permitted, under the circumstances presented herein, to claim net operating loss carryforwards from the years 1974 and 1975 since such carryforwards were not permitted by Internal Revenue Code §172 [Tax Law §1503(b)(4)].

G. That the petition of Eveready Insurance Company is denied and the Notice of Deficiency dated July 17, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER